Supreme Court, U.S.
FILED
DEC 15 1983
ALEXANDER L. STEVAS
CLERK

No. 83-819

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHIRLEY METZ,

Petitioner,

vs.

TOOTSIE ROLL INDUSTRIES, INC., and LOCAL UNION NO. 1, BAKERY, CONFECTIONERY AND TOBACCO WORKERS' INTERNATIONAL UNION OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF TOOTSIE ROLL INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

ROBERT N. SODIKOFF
HALBERT O. CREWS
GREENBERG KEELE LUNN
& ARONBERG
Of Counsel

MITCHELL S. GOLDGEHN
One IBM Plaza, Suite 4500
Chicago, Illinois 60611
(312) 828-9600
Attorney of Record for
Tootsie Roll Industries, Inc.
Respondent-Appellee

Pandick Press Midwest, Inc., Chicago • 454-7600

ADDITIONAL QUESTION PRESENTED FOR REVIEW

(1) Did the union's failure and refusal to file and process the employee's grievance within the time requirements of the collective bargaining agreement start the running of the statute of limitations.

TABLE OF CONTENTS

	PAGE
Additional Statement of the Case	2
Summary of Argument	3
Reasons for Denial of Writ	3
I. The petition fails to show a reason for review conforming to the standards of Supreme Court Rule 17	3
II. The statute of limitations bars plaintiff's claims	4
III. The union's inactivity did not constitute multiple violations of the union's duty of fair representation	5
Conclusion	6

TABLE OF AUTHORITIES

PAGE

Del Costello v. *International Brotherhood of Teamsters*, ____ U. S. ____, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (June, 1983) 4

Hungerford v. *United States*, 307 F. 2d 102 (10th Cir. 1962) 4

Local Lodge No. 1424, International Association of Machinists v. *NLRB*, 362 U. S. 411, 4 L. Ed. 2d 832, 80 S. Ct. 822 (1960) 5

NLRB v. *Albritton Engineering Corp.*, 340 F. 2d 281 (5th Cir. 1965) 5

NLRB v. *Auto Warehousers, Inc.*, 571 F. 2d 860 (5th Cir., 1978) 6

NLRB v. *Basic Wire Products, Inc.*, 516 F. 2d 261 (6th Cir. 1975) 5

United Rubber Workers v. *NLRB*, 368 F. 2d 12 (5th Cir. 1966) 5

Federal Statutes:

29 U.S.C. § 160 (b) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHIRLEY METZ,

Petitioner,

vs.

TOOTSIE ROLL INDUSTRIES, INC., and LOCAL UNION NO. 1, BAKERY, CONFECTIONERY AND TOBACCO WORKERS' INTERNATIONAL UNION OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF TOOTSIE ROLL INDUSTRIES, INC.* IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent, Tootsie Roll Industries, Inc., respectfully prays that the Petition for Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 16, 1983 be denied.

---

* Tootsie Roll Industries, Inc. has no parent corporation and has no subsidiaries other than those wholly owned by it, and no affiliates.

ADDITIONAL STATEMENT OF THE CASE

The Petition of Plaintiff filed with this Court for Certiorari to the Seventh Circuit Court of Appeals omits reference in its Statement of the Case to certain facts which are essential to any review of the decision of the Court of Appeals.

Plaintiff, Shirley Metz, was discharged from employment by Tootsie Roll Industries, Inc. (TRI) on January 15, 1981. In her Complaint, Plaintiff made the following allegations with respect to her discharge:

> (a) Upon her discharge, Plaintiff notified the Union of her discharge and requested that the Union initiate a grievance on her behalf; (paragraph 18) (R. 4)
>
> (b) Under the collective bargaining agreement between TRI and the Union, all grievances must be filed within five (5) days; (paragraph 10) (R. 4)
>
> (c) Despite her request, the Union failed to initiate the grievance procedure and thereafter in bad faith and in an arbitrary and discriminating manner refused to process the grievance or to take any affirmative action on her behalf; (paragraph 19) (R. 4)
>
> (d) The Union failed and refused to take any further action on the Plaintiff's discharge from May 5, 1981 to the present, ie. until the time of filing her Complaint—June 23, 1982. (paragraph 23) (R. 5)

The provisions contained in the collective bargaining agreement (the "Bargaining Agreement") between TRI and the Union relating to grievance procedures are quoted in Note 3 to the Opinion of the Court of Appeals below. These grievance procedures require the filing of the grievance within five (5) days. The grievance is then processed through several stages of negotiation, each one having a time limitation for completion. The procedure culminates in approximately twenty-three (23) days with a decision to be made exclusively by the Union as to whether there shall be arbitration.

SUMMARY OF ARGUMENT

1. The petition fails to assert grounds set forth in Supreme Court Rule 17 for issuance of a Writ of Certiorari.

2. The statute of limitations in Section 10(b) of the NLRA bars the action.

3. The alleged failure of fair representation by the union was not a continuing violation extending the time for the running of the statute of limitations.

REASONS FOR DENIAL OF WRIT

I.

THE PETITION FAILS TO SHOW A REASON FOR REVIEW CONFORMING TO THE STANDARDS OF SUPREME COURT RULE 17

Plaintiff's Petition has not urged any of the special or important reasons for granting the Writ in this case as described in the Supreme Court Rule 17. In fact, none is present in the case. There is no claim of conflict between decisions of Federal Courts of Appeal in the same matter. Nor is there any showing of conflict with an applicable decision of this Court. No important question of Federal law is presented.

The sole issue in the case concerns whether Plaintiff's claimed cause of action was barred by the applicable Statute of Limitations under the specific factual circumstances which are involved. Plaintiff simply argues that the Seventh Circuit Court of Appeals erred in its decision as to when a cause of action accrued to the Plaintiff. The circumstances are most unlikely to again be presented for judicial review. Employee grievances are commonly disposed of with dispatch, and it is not to be expected that an employee who requests his union to process a grievance would in any other case conclude that the grievance is still undecided more than a year later. There being no special reason shown for the exercise by this Court of its discretion in granting a review of this case, it is submitted that the Petition should be denied.

II

THE STATUTE OF LIMITATIONS BARS PLAINTIFF'S CLAIMS

Plaintiff concedes that this Court's decision in *Del Costello* v. *International Brotherhood of Teamsters*, ____ U.S. ____, 76 L.Ed.2d 476, 103 S.Ct. 2281 (June, 1983) requires the application of the six months limitation period provided by Section 10(b) of the National Labor Relations Act (29 U.S.C. 160(b)) to Plaintiff's cause of action. This leaves Plaintiff's argument resting upon the very narrow and limited claim that in her case the statute never commenced to run and no cause of action ever accrued because she was never formally advised that her grievance had not been filed or processed by the Union. Plaintiff waited one year and five months after her discharge before she filed the suit.

Plaintiff's contention requires her to ignore the specific allegations made in her Complaint and the plain language of the Bargaining Agreement dealing with grievances. Plaintiff claims in her Petition to this Court that the Union never informed her that it would not file or process her grievance and that some formal notice from the Union was required before the limitations period could commence to run.

The Seventh Circuit correctly found the fallacy in this position. Plaintiff as a Union member, knew, or at least should have known, that the Bargaining Agreement required the filing of her grievance in five days and the making of a final decision before arbitration in about 23 days. Plaintiff does not claim that she did anything to find out about the status of her grievance at any time. She simply waited for over a year for someone to give her information which she could have easily obtained by an inquiry to the Union at some time along the line. In the exercise of reasonable deligence Plaintiff should have known very early in the proceedings that her grievance had not been filed. *Hungerford* v. *United States* 307 F. 2d 102 (10th Cir. 1962).

At Page 8 of her Petition, Plaintiff refers to a letter dated May 5, 1981 written by the Union to TRI requesting reinstatement of Plaintiff's employment. If anything that letter should have caused Plaintiff to inquire of the Union as to the status of her grievance. Yet all she says in her Complaint is that "the Union failed and refused to take any further action on Plaintiff's discharge from May 5, 1981 to the present". Plaintiff still waited more than a year after the date of the letter to file suit.

It is submitted that Plaintiff's own lack of diligence was the sole cause of her delay in filing the suit.

III

THE UNION'S INACTIVITY DID NOT CONSTITUTE MULTIPLE VIOLATIONS OF THE UNION'S DUTY OF FAIR REPRESENTATION

Commencing on Page 9 of the Petition, Plaintiff argues that in this case the Union was guilty of a continuing violation of its duty to Plaintiff resulting in multiple causes of action each having its own separate statutory limitations. The Court of Appeals gave full consideration to this argument and properly rejected it. Plaintiff makes no attempt to respond to the painstaking discussion by the Court of Appeals of the case of *Local Lodge No. 1424, International Association of Machinists* v. *NLRB ("Bryan Manufacturing")* 362 U.S. 411, 4 L.Ed.2d 832, 80 S.Ct. 822 (1960) wherein the same contention was overruled.

The cases of *NLRB* v. *Basic Wire Products, Inc.*, 516 F.2d 261 (6th Cir. 1975), *NLRB* v. *Albritton Engineering Corp.*, 340 F.2d 281 (5th Cir. 1965) and *United Rubber Workers* v. *NLRB*, 368 F.2d 12 (5th Cir. 1966) cited by Plaintiff all involved repeated action on the part of defendants, each repetition of which was a new cause of action. Here Plaintiff has alleged only one submission of a grievance. That one occasion took place more than a year before the suit was filed. There was no further demand made by Plaintiff on the Union thereafter.

In the case of *NLRB* v. *Auto Warehousers, Inc.*, 571 F.2d 860 (5th Cir. 1978) the Court said, at page 865: "Independent violations of continuing obligations do not exist where the illegality of the conduct charged cannot be established without assessing events outside the 10(b) period." In this case, the Union's inactivity, in and of itself, did not constitute an unfair labor practice. Only by reference to the events which took place more than 6 months prior to the filing of the Complaint, i.e., the discharge of the Plaintiff by TRI and the Union's failure and refusal to file or process a grievance on the Plaintiff's behalf, could the Union's conduct be determined to be illegal. Accordingly, the Plaintiff's federal action against the Union and, consequently, her action against TRI were time-barred under the authority of *Bryan Manufacturing*, supra.

CONCLUSION

It is submitted that for the reasons set forth above, the Petition for a Writ of Certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

ROBERT N. SODIKOFF
HALBERT O. CREWS
GREENBERG KEELE LUNN
& ARONBERG
Of Counsel

MITCHELL S. GOLDGEHN
One IBM Plaza, Suite 4500
Chicago, Illinois 60611
(312) 828-9600
Attorney of Record for
Tootsie Roll Industries, Inc.
Respondent-Appellee